No. 89-1279

In the Supreme Court of the United States

OCTOBER TERM, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY, PETITIONER

v.

CLEOPATRA HASLIP, ET AL., RESPONDENTS

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF FOR THE BUSINESS ROUNDTABLE AND THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., AS AMICI CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

This brief will address the following question:

Whether the punitive damages award in this case violates the Due Process Clause because the amount of the penalty imposed is not rationally related to the purposes of fairly punishing the misconduct that occurred or appropriately deterring such misconduct.

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INTEREST OF THE AMICI CURIAE

The Business Roundtable is an association of the chief executive officers of approximately 200 of the largest companies in the Nation. The Roundtable examines public issues that affect the economy and develops positions that seek to reflect sound economic and social policies. The Product Liability Advisory Council, Inc., is an association of major industrial companies formed for the purpose of filing amicus curiae briefs in cases involving significant issues affecting the law of product liability. Amici have an interest in the resolution of this case because their members frequently are defendants in actions in which punitive damages are sought. Amici's members thus face on a daily basis the threat of irra-

tional and excessive punitive damages awards that is an omnipresent feature of the current punitive damages system.[1]

SUMMARY OF ARGUMENT

It is well settled that the Due Process Clause prohibits civil monetary penalties that are arbitrary and irrational. The decisions of this Court establish that a civil penalty violates due process if it is disproportionate to the objectives sought to be achieved by the imposition of such punishment. That analysis is fully applicable to punitive damages awards; an award that is not rationally related to the retributive and deterrent purposes of punitive damages is unconstitutionally excessive.

Under the proportionality analysis of *Solem* v. *Helm*, 463 U.S. 277 (1983), an award of punitive damages is arbitrary and irrational if it (a) is disproportionate to criminal and civil penalties established by the legislature for similar conduct or (b) bears no reasonable relationship to the nature and gravity of the defendant's conduct. The legislative process is well suited for determining the level of punishment that is appropriate in light of the type of misconduct involved and the penalties provided for other categories of wrongdoing; accordingly, the legislature's judgment provides a significant objective benchmark for judging the excessiveness of the punishment meted out by a jury in the context of a punitive damages award. In addition, punitive damages must be rationally related to the nature of the defendant's wrong, including in particular the degree of the defendant's culpability and (to the extent not already accounted for in the compensatory damages award) the amount of the gain to the defendant or loss to the plaintiff that resulted from the misdeeds.

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[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court.

Applying this standard here, it is clear that the $1,000,000 punitive damages award is excessive and irrational. The award is grossly disproportionate to legislatively prescribed penalties in Alabama and elsewhere for even the most severe wrongdoing. Such penalties seldom exceed the range of $10,000 to $100,000—a level of punishment some 10 to 100 times lower than the punitive damages award selected by the jury.

Likewise, the award bears no conceivable relationship to the misconduct being punished. If Lemmie Ruffin, the miscreant insurance agent, is viewed as the object of the punishment, his actions, while intentional and serious, caused only a small gain to himself and slight harm to Mrs. Haslip (her actual damages were $4,000 and her total compensatory damages were $40,000) in relation to the enormous punitive award. If, on the other hand, Pacific Mutual is being punished for corporate wrongdoing, a large award is equally unjustified. Ruffin did not engage in his misconduct pursuant to any company policy (indeed, he violated company policy), nor did he act with the knowledge or approval of corporate management; his actions were not in any way in furtherance of the company's interest, since his defalcation benefited only himself and occurred at the expense of the company. Thus, while we doubt that Pacific Mutual is properly subject to punishment at all in these circumstances, it certainly cannot be held liable for anything approaching $1,000,000 in punitive damages.

ARGUMENT

THE PUNITIVE DAMAGES AWARD IN THIS CASE VIOLATES DUE PROCESS BECAUSE IT IS NOT RATIONALLY RELATED TO THE PURPOSES OF PUNISHMENT OR DETERRENCE

There can be no doubt that "[a]wards of punitive damages are skyrocketing." *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2924 (1989) (O'Connor, J., concurring and dissenting). In the past, punitive damages were awarded in only a small fraction of cases where the challenged conduct was egregiously offensive; today, as this case illustrates, the distinction between the culpability sufficient to support liability for compensatory damages and the culpability warranting punitive damages has all but collapsed. In the past, punitive damages were awarded in modest amounts; today, as this case illustrates, many awards are breathtakingly large. In the past, punitive damages awards generally bore a discernible relationship to the offensiveness of the defendant's behavior and roughly accorded with fines applicable to analogous criminal conduct; today, as this case illustrates, punitive damages often simply reflect sympathy for the plaintiff or the size of the defendant's pocketbook. See, *e.g.*, P. Huber, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 127 (1988); M. Peterson, *et al.*, PUNITIVE DAMAGES: EMPIRICAL FINDINGS 65 (1987).

Petitioner Pacific Mutual Life Insurance Company has presented a number of substantial constitutional challenges to the million dollar punitive damages award in this case. We fully agree with Pacific Mutual that due process forbids the imposition of any punishment on account of its actions (see pages 23-25, *infra*) and that the jury's verdict was the product of a gravely flawed set of procedures. However, assuming *arguendo* that some punishment of Pacific Mutual could be sustained following the trial that was held and on the facts shown, we nonetheless believe that the amount of punitive damages awarded by the jury deprives Pacific Mutual of its property without due process because the punishment is wholly disproportionate to the company's wrongful conduct and does not rationally advance the purposes of exacting punitive damages.

I. THE DUE PROCESS CLAUSE PROHIBITS DISPROPORTIONATE AND IRRATIONAL AWARDS OF PUNITIVE DAMAGES

A. A Punitive Damages Award That Is Arbitrary And Irrational In Amount Deprives The Defendant Of Property Without Due Process.

The Due Process Clause of the Fourteenth Amendment "'protect[s] * * * against arbitrary action[s] of government' * * * regardless of the fairness of the procedures used to implement them." *Daniels* v. *Williams*, 474 U.S. 327, 331 (1986) (citation omitted). See also, *e.g.*, *Lassiter* v. *Department of Social Services*, 452 U.S. 18, 24 (1981) (due process "expresses the requirement of 'fundamental fairness'"). And, as the Court has repeatedly held, the protections of the Due Process Clause extend to "civil * * * defendants [seeking] to protect their property." *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982). It follows that a disproportionate award of punitive damages—one that bears no rational relationship to the purposes for which the damages have been exacted—violates due process of law.

There can be no doubt that the imposition of punitive damages constitutes a government-compelled deprivation of property.[2] Accordingly, the Due Process Clause re-

[2] A punitive damages award plainly is state action subject to the Due Process Clause. It is embodied in the judgment of a state court—which itself constitutes state action—and state law obligates the defendant to pay the judgment. See *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46 (1988); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 265 (1964). See also *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975).

quires that the deprivation not be arbitrary or irrational. As this Court recently noted, punitive damages are intended to "advance the interests of punishment and deterrence." *Browning-Ferris*, 109 S. Ct. at 2920. See also *Smith* v. *Wade*, 461 U.S. 30, 49, 54 (1983); *International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42, 48 (1979) (citation and internal quotation marks omitted) ("Punitive damages are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence"); RESTATEMENT (SECOND) OF TORTS § 908 comment a (1979). Therefore, an award of punitive damages satisfies due process only if it reasonably serves to punish and deter. Any part of a punitive damages judgment that is larger than necessary to accomplish those purposes has *no* legitimate justification and amounts to nothing less than an arbitrary, irrational, and fundamentally unfair transfer of the defendant's property to the plaintiff.

In light of these principles, it is not surprising that this Court has long recognized that the Due Process Clause prohibits excessive civil monetary penalties in litigation between private parties. In *Waters-Pierce Oil Co.* v. *Texas*, 212 U.S. 86, 111 (1909), in considering a due process challenge to a state civil penalty, the Court stated unequivocally that the Constitution would be violated by "fines * * * [that] are so grossly excessive as to amount to a deprivation of property without due process of law." Similarly, in *St. Louis, I.M. & S. Ry.* v. *Williams*, 251 U.S. 63 (1919), the Court recognized that the Due Process Clause "places a limitation upon the power of the States to prescribe [civil] penalties" that are "wholly disproportioned to the offense and obviously unreasonable." 251 U.S. at 66-67; see also *Missouri Pac. Ry.* v. *Humes*, 115 U.S. 512, 523 (1885) (reviewing constitutionality of statutory double-damages penalty under the Due Process Clause).

The Court has applied these principles to invalidate disproportionate civil penalties. For example, in *Missouri*

Pac. Ry. v. *Tucker*, 230 U.S. 340 (1913), the Court struck down a penalty of $500 for a $3.02 overcharge, holding that the penalty was "grossly out of proportion to the possible actual damages" and therefore in violation of due process. 230 U.S. at 351 (citing *Waters-Pierce*); see also *Southwestern Tel. & Tel. Co.* v. *Danaher*, 238 U.S. 482, 490-491 (1915) (invalidating penalty on due process grounds). The Court recently acknowledged these precedents in the decision in *Browning-Ferris*, 109 S. Ct. at 2921; see also *id.* at 2923 (Brennan, J., concurring).[3]

Although the Court has not heretofore had occasion to apply the Due Process Clause to a punitive damages award, we can imagine no reasoned justification for limiting the protection against excessive civil penalties to penalties imposed pursuant to statute. The harm to a defendant from an irrational government-imposed civil penalty is no less simply because the penalty is imposed pursuant to a common law rule. To the contrary, the danger of arbitrary government action, and therefore the need for constitutional protection, is far greater when a jury is permitted to exercise essentially unbridled discretion in fixing the amount of the penalty. See *Browning-Ferris*, 109 S. Ct. at 2923 (Brennan, J., concurring); see also pages 11-12, *infra*.

The conclusion that the Due Process Clause provides protections in this context analogous to those afforded by the Excessive Fines Clause with respect to criminal fines is consistent with this Court's decisions in other areas in which the Eighth Amendment does not apply due to technical limitations on its scope. In *City of Revere* v. *Massachusetts General Hospital*, 463 U.S. 239 (1983), for example, the Court held that, even though the Eighth Amendment was inapplicable, the Due Process Clause required that medical care be provided to a

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[3] Significantly, even the plaintiff in *Browning-Ferris* did not dispute that the Due Process Clause imposes a substantive limit on punitive damages awards. 88-556 Resp. Br. 7, 29.

person injured while being arrested. "In fact," the Court stated, "the due process rights of a person in [that] situation are at least as great as the Eighth Amendment protections available to a convicted prisoner." 463 U.S. at 244; see also *Bell* v. *Wolfish*, 441 U.S. 520, 535-536 & n.16 (1979) (Due Process Clause protects pretrial detainees, who are not entitled to Eighth Amendment protection because they have not been convicted).

The same approach is proper in the present context. The Court's conclusion in *Browning-Ferris* that technical limitations on the Excessive Fines Clause place punitive damages awards to private parties beyond that Clause's reach does not justify exempting such awards from all constitutional scrutiny. Indeed, it would be astounding if the Due Process Clause offered no protection against irrational government action that deprived a defendant of an exorbitant sum of money simply because the deprivation occurred in the context of private civil litigation and was labeled "punitive damages."

B. A Punitive Damages Award Is Arbitrary And Irrational If It Is Disproportionate To The Objectives Of Imposing Punishment.

As in other areas of substantive due process, the governing constitutional standard is one of rationality. This Court's decisions establish that punishment violates the Due Process Clause if it is "wholly disproportioned to the offense and obviously unreasonable." *St. Louis, I.M. & S. Ry.*, 251 U.S. at 67. See also *Chicago & N.W. Ry.* v. *Nye Schneider Fowler Co.*, 260 U.S. 35, 44 (1922) (to be valid, "penalties * * * must be moderate and reasonably sufficient to accomplish their legitimate object"; those that are "plainly arbitrary and oppressive" violate the Due Process Clause); *Waters-Pierce*, 212 U.S. at 111 ("grossly excessive" civil penalties violate due process).

Of course, the question whether a penalty is "unreasonable" or "disproportion[ate] to the offense" cannot be answered in a vacuum or by a wholly subjective and standardless inquiry of the kind all too many courts currently

engage in when reviewing punitive damages awards. This Court has firmly rejected such an ad hoc approach, instead assessing the constitutionality of civil penalties by evaluating whether they are no more than is "reasonably sufficient to accomplish their legitimate object." *Nye Schneider Fowler Co.*, 260 U.S. at 44. That is the same approach the Court has utilized in other contexts in which it must evaluate the proportionality and reasonableness of government action.

For example, in determining whether a criminal sentence is disproportionate to a particular offense and thus violates the Cruel and Unusual Punishments Clause, the Court inquires whether the sentence is justified by reference to the purposes of criminal penalties—deterrence and punishment. *Enmund* v. *Florida*, 458 U.S. 782, 800-801 (1982). That analogy is particularly probative in view of the fact that punitive damages have the same deterrent and penal purposes as criminal sanctions.

Similarly, bail is excessive within the meaning of the Eighth Amendment if it is "set at a figure higher than an amount reasonably calculated to fulfill th[e] purpose" of bail—ensuring the presence of the defendant. *Stack* v. *Boyle*, 342 U.S. 1, 5 (1951). See also *United States* v. *Salerno*, 481 U.S. 739, 754 (1987) (emphasis added) ("when the government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, *and no more*"); *United States* v. *United Mine Workers*, 330 U.S. 258, 304 (1947) (a court should calculate the appropriate fine for civil contempt by looking to the purposes for which the fine is imposed).

Here too, courts should judge the rationality of the government action by reference to its purposes. So long as an award of punitive damages is "no more" than is "reasonably calculated" to serve the purposes of deterrence and punishment, it will pass muster under the Due Process Clause. If, on the other hand, the award exceeds any amount reasonably justified in light of these

purposes, it is a disproportionate and irrational sanction that violates the Constitution.[4] As we now discuss, this Court's decision in *Solem* v. *Helm*, 463 U.S. 277 (1983), provides the appropriate judicial standard for this inquiry.

II. AN AWARD OF PUNITIVE DAMAGES IS DISPROPORTIONATE AND IRRATIONAL IF IT SUBSTANTIALLY EXCEEDS ANALOGOUS STATUTORY PENALTIES AND BEARS NO REASONABLE RELATIONSHIP TO THE NATURE OR GRAVITY OF THE DEFENDANT'S CONDUCT

The basic framework for analyzing the proportionality of civil penalties was established in *Solem* v. *Helm*, which involved the closely related question of how to determine whether criminal penalties are disproportionate to the defendant's wrongdoing. First, the Court compared "the gravity of the offense and the harshness of the penalty" (463 U.S. at 290-291). Next, it assessed the reasonableness of that relationship by measuring it against the sentences that could be imposed for other offenses in the same jurisdiction and the sentences authorized for the same offense in other jurisdictions. *Id.* at 291-292, 298-300. These factors—modified so as to shift the focus to

[4] Some have suggested that the haphazard and unpredictable character of today's punitive damages awards is a virtue because it prevents companies from treating misconduct simply as a calculable cost of doing business. See Brief of Consumers Union of the United States, *et al.*, as Amici Curiae in *Browning-Ferris*, at 42-51. Such irrationality is not only unacceptable as an instrument of government but ineffectual to control misconduct. A predictable, properly proportioned punishment is the most effective possible deterrent, because the actor would know in advance that it would lose, not gain, by engaging in the conduct in question. See Elliott, *Why Punitive Damages Don't Deter Corporate Misconduct Effectively*, 40 ALA. L. REV. 1053 (1989). Moreover, the argument that a system of punishment must be irrational and unpredictable in order to be effective would apply equally to criminal sanctions, but this Court made clear in *Solem* v. *Helm*, 463 U.S. 277 (1983), that criminal penalties must be proportional to the offense and rational in light of the purposes for which the sanction is imposed.

punitive damages rather than criminal sentences—should also guide the present inquiry. *Browning-Ferris*, 109 S. Ct. at 2933-2934 (O'Connor, J., concurring and dissenting).[5]

In applying the *Solem* factors, however, it is important to appreciate the critical distinction between a criminal sentence imposed by a court pursuant to statutory standards and a punitive damages verdict announced by a jury in the exercise of virtually untrammeled discretion. A jury's unguided award of punitive damages is not entitled to judicial deference comparable to that which is appropriate for punishments that fall within a legislatively prescribed range.

A legislature's decision to authorize the imposition of a particular sanction for a particular type of misconduct reflects a finding—either explicit or implicit—that there is a reasonable relationship between the sanction and the misconduct. In view of the legislature's superior ability to gather relevant facts, ascertain and express the values of the community, and establish a proportional system of sanctions by considering each offense as part of the broader universe of wrongful conduct and fixing the proper relationship between various categories of offenses, the legislature's determinations of reasonableness plainly should be accorded "substantial deference." *Solem*, 463 U.S. at 290; see also *Gore* v. *United States*, 357 U.S. 386, 393 (1958) (the proper apportionment of punishment is "peculiarly [a] question[] of legislative policy"); *Weems* v. *United States*, 217 U.S. 349, 378 (1910).

[5] The evaluation of the rationality of a punitive damages award should reflect as well the common-sense principle that "[t]he greater the sanction, the more confidence there should be that it is justified." *AMPAT/Midwest, Inc.* v. *Illinois Tool Works Inc.*, 896 F.2d 1035, 1044 (7th Cir. 1990). A court should look more closely at a punishment of, for example, $500,000 than at one of $5,000. Large awards, such as those of $1 million or more, should receive especially close scrutiny.

"Substantial deference" is appropriate, though, only when the legislature has in fact authorized the sanction under review. As Justice Brennan observed in *Browning-Ferris*, "scrutiny of awards made without the benefit of a legislature's deliberation and guidance [should] be less indulgent than * * * consideration of those that fall within statutory limits." 109 S. Ct. at 2923 (concurring opinion); see also *id.* at 2934 (O'Connor, J., concurring and dissenting) (substantial deference should be accorded to legislative judgments).

A jury hearing a single case differs from a legislature in at least one especially relevant respect. The jury considers its case in isolation and in retrospect. Unlike a legislature, the jury lacks the information and expertise needed to place the particular defendant's actions in the context of the entire range of behavior that society deems wrongful and has no knowledge of the scale of punishments to which other wrongdoers are subjected. An unguided jury is therefore much less likely than a legislature to be able to devise a punishment that is appropriately proportioned to the relative wrongfulness of the defendant's conduct. Accordingly, in applying the *Solem* standard to an award of punitive damages, courts should give little deference to the jury's determination of the proper punishment but rather should closely scrutinize the reasonableness of such an award in determining whether it passes muster under the Due Process Clause. *Browning-Ferris*, 109 S. Ct. at 2923 (Brennan, J., concurring) (it is appropriate to "look longer and harder at an award of punitive damages based on such skeletal guidance than * * * at one situated within a range of penalties as to which responsible officials had deliberated and then agreed").

With this preface, we now briefly sketch the factors that should be considered in determining whether a punitive damages award is so disproportionate to the defendant's misconduct as to violate due process.

A. Punitive Damages Are Disproportionate If They Substantially Exceed The Statutory Penalties Prescribed By The Legislature.

As in most states today, a jury's award of punitive damages in Alabama is not constrained by any legislatively determined ceiling. In this circumstance, the excessiveness inquiry should first compare the penalty selected by the jury with the sanctions set forth in relevant criminal and civil penalty statutes in order to determine whether the award is in line with punishments fixed by the legislature for similar conduct. See *Solem*, 463 U.S. at 291-292; see also *Weems*, 217 U.S. at 380-381. For the reasons just discussed, the legislature's judgment in setting criminal fines and civil penalties—which, like punitive damages, are designed to further the goals of punishment and deterrence—furnishes a powerful objective standard for a court assessing the reasonableness of a punitive damages award.

If the jury's punishment significantly exceeds the penalty range established by the legislature in analogous areas, that is a telling sign that the award is disproportionate. Indeed, in some cases that comparison may be sufficient in itself to demonstrate the existence of a constitutional violation. For example, if a corporation found guilty of fraudulent trade practices could be fined a maximum of $50,000, it would be difficult to justify upholding a jury verdict of $5,000,000 to punish and deter the identical conduct.[6] Where such a comparison does not

[6] Another telltale indication of excessiveness would arise if the verdict under examination were substantially out of line with other awards of punitive damages. *Browning-Ferris*, 109 S. Ct. at 2934 (O'Connor, J., concurring and dissenting); *Solem*, 463 U.S. at 291-292, 298-300. The converse, however, is certainly not true, for the existence of other large punitive verdicts likely reflects nothing more than the predictable results of having punitive damages set by juries exercising unguided and unconstrained discretion. In particular, justifying an award in terms of its relation to only a few of the highest previous awards will lead to an inexorable upward spiral, as more and more large awards are justified by reference

conclusively establish the excessiveness of a sanction, a court should turn to an examination of the proportionality of the penalty to the gravity of the particular conduct being punished.

B. Punitive Damages Are Disproportionate If They Do Not Bear A Reasonable Relationship To The Misconduct For Which Punishment Is Being Imposed.

Another important factor under *Solem* is "the gravity of the offense" for which punishment is being imposed. 463 U.S. at 290-291. From the standpoint of both just retribution and deterrence, a greater wrong should be punished more severely than a lesser wrong. H.L.A. Hart, PUNISHMENT AND RESPONSIBILITY 9, 25 (1968); J. Bentham, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 179-182 (1892 ed.). This is no less true for punitive civil damages than for criminal fines.

Solem set forth a number of criteria by which the nature of an offense may be measured. See 463 U.S. at 292-294. This Court's due process decisions also provide guidance. See pages 8-9, *supra*. In addition, the common law standards developed in the context of excessiveness challenges to punitive damages awards look to several considerations that may be relevant in determining the gravity of particular conduct. Drawing upon these sources, a punitive damages award can be said to be disproportionate to the conduct for which punishment is being imposed when it lacks any reasonable relation to the character of the defendant's misdeeds, to the injury caused by the defendant's actions, or to the actual or potential gain to the defendant.

This is not to say that each of these considerations will be applicable or of equal weight in every instance; their significance will depend upon the particulars of the given case. Where, however, a punitive damages

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to prior large awards, and in turn validate still higher awards in the future.

award appears disproportionate in relation to any of these benchmarks, that is a strong signal that the award does not rationally advance the objectives of imposing punishment and thus is constitutionally infirm.

Furthermore, where the defendant is a corporation, labor union, religious body or other organization whose members or owners consist principally or entirely of persons wholly innocent of the alleged wrongdoing, the courts should be especially sensitive to the potential unfairness of imposing an excessively large punishment upon blameless individuals. Here, for instance, Pacific Mutual is owned by its policyholders, who, of course, had no part in the wrongdoing but will be forced to bear the full brunt of any punishment.[7]

1. *Character of the defendant's conduct*

In analyzing the character of the defendant's conduct, a reviewing court should first and foremost consider the relative seriousness of the wrongdoing for which the punishment is being imposed. See *Rowlett* v. *Anheuser-Busch, Inc.*, 832 F.2d 194, 207 (1st Cir. 1987) (quoting

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[7] In holding that municipalities are not subject to punitive damages in actions under 42 U.S.C. § 1983, this Court observed that "[r]egarding retribution, * * * an award of punitive damages against a municipality 'punishes' only the taxpayers, who took no part in the commission of the tort. * * * Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers." *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981). "Under ordinary principles of retribution," the Court continued, speaking to a point quite material to this case,

> it is the wrongdoer himself who is made to suffer for his unlawful conduct. If a government official acts knowingly and maliciously to deprive others of their civil rights, he may become the appropriate object of the community's vindictive sentiments. A municipality, however, can have no malice independent of the malice of its officials. Damages awarded for *punitive* purposes, therefore, are not sensibly assessed against the governmental entity itself.

453 U.S. at 267 (citations omitted; emphasis in original).

RESTATEMENT (SECOND) OF TORTS § 908(2)) (the award "must bear some relation to the 'character of the defendant's act' "). There are several commonly accepted yardsticks against which the nature of the defendant's wrongful conduct may be measured. For example, as the Court observed in *Solem*, "nonviolent crimes are less serious than crimes marked by violence or the threat of violence" (463 U.S. at 292-293).

In judging the gravity of the misconduct, the degree of the defendant's culpability is also of central importance. See *Solem*, 463 U.S. at 293-294. A defendant would be highly culpable where, for instance, it violated a fiduciary duty to the plaintiff or otherwise abused a position of trust. Similarly, if a defendant acted with what is commonly called "actual malice"—*i.e.*, with the specific intent or purpose to injure the plaintiff or others—it would have behaved in a highly culpable manner that would support a relatively higher level of punishment. If, on the other hand, a defendant lacked any intent to cause harm but acted in a manner that was later found to have been "reckless" or in "disregard" of the plaintiff's rights, only a lower level of punishment could be justified (assuming that punitive damages would be appropriate at all). While a state may have the constitutional authority to subject reckless or even "grossly" negligent conduct to punishment in the form of punitive damages, principles of fundamental fairness require that the amount of punishment in such a case be commensurate with the lesser degree of culpability.[8]

[8] Punitive damages are not available unless a defendant is shown to have acted wrongfully. See generally RESTATEMENT (SECOND) OF TORTS § 908(1); 1 J. Ghiardi & J. Kircher, PUNITIVE DAMAGES LAW AND PRACTICE § 5.01 (1985). Thus, proof of the requisite wrongdoing simply establishes that the conduct merits punishment and does not speak to the appropriate size of the punishment. The record would have to show something more, such as a specific intent to cause injury or an extraordinary level of wantonness, in order to justify an especially large verdict.

In addition, where the defendant is a corporation or other organization, its level or extent of culpability depends upon the nature of the organization's complicity in the wrongful conduct. If the conduct was undertaken pursuant to corporate policy or was approved by high-ranking officers, a relatively greater sanction would be permissible, both because the corporation could in such a case fairly be said to be more "culpable" and because higher-level corporate actors have the capacity to commit greater wrongs in the name of the corporation. If, on the other hand, the misconduct was the isolated act of one or two low-level employees, the organization's culpability would be less, and only a relatively smaller sanction would be reasonable.

2. *Injury caused by the misconduct*

Another red flag indicating excessiveness is the presence of a gross disproportion between the punitive damages award and the injury inflicted by the defendant's conduct. *Solem*, 463 U.S. at 292-293. See also *Life & Casualty Ins. Co.* v. *McCray*, 291 U.S. 566, 573 (1934) (sustaining penalty for wrongfully withholding payment because the penalty amount bore a "reasonable proportion to the possible actual damages"); *United States* v. *Busher*, 817 F.2d 1409, 1415 (9th Cir. 1987). Other things being equal, "[t]he absolute magnitude of the [harm involved] may be relevant" (*Solem*, 463 U.S. at 293)."

It by no means follows, however, that proportionality in this factor establishes that a punishment is not exces-

[9] The extent of the injury inflicted generally is reflected by the amount of compensatory damages. For that reason, common law excessiveness standards identify the amount of compensatory damages as a relevant factor in assessing the propriety of a punitive damages award. See, *e.g.*, *Roulett* v. *Anheuser-Busch, Inc.*, 832 F.2d at 207 (quoting RESTATEMENT (SECOND) OF TORTS § 908(2)) ("the award * * * must bear some relation to * * * 'the nature and extent of the harm to the plaintiff that the defendant caused' "); see generally K. Redden, PUNITIVE DAMAGES § 3.5(A) (1980 & 1987 Supp.).

sive, especially when the harm to the plaintiff was unintended by the defendant. The primary reason why harm is deemed relevant to the level of punishment of crimes is that society wishes to ensure greater deterrence of more socially injurious acts than of less dangerous ones. But in the context of civil tort actions, that objective is already attained by the fact that the defendant's duty to make compensation will itself vary directly with the extent of the harm caused by his wrongful acts.

Thus, in many circumstances, compensatory damages awards themselves can fully satisfy the goals of punishment and deterrence. See *Memphis Community School Dist.* v. *Stachura*, 477 U.S. 299, 312-313 (1986); *Smith* v. *Wade*, 461 U.S. at 94 (O'Connor, J., dissenting); Ellis, *Punitive Damages in Iowa Law: A Critical Assessment*, 66 IOWA L. REV. 1003, 1060 (1981); Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1182 (1931). Particularly where the compensatory award is sizeable, this element is likely to obviate the need for punitive damages altogether or at least to reduce the amount of such damages that are reasonably necessary to punish and deter.[10]

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[10] This is especially true where recovery for intangible harm such as mental anguish or pain and suffering is a substantial component of the compensatory award. Such damages often are so large—and so far in excess of the defendant's gain—that they fully satisfy the purposes of punishment. It is well recognized that damages for pain and suffering—which "frequently constitute[] the largest portion of awards"—are inherently "indeterminate" and thus are "left to the discretion of the trier of fact": because the measurement of such damages is "essentially subjective" and "elusive," awards for pain and suffering are "open-ended to the point of inviting abuse" and are determined in the "virtually untrammeled discretion" of the jury. 1 M. Minzer, *et al.*, DAMAGES IN TORT ACTIONS 4-6, 4-10, 4-198, 4-205, 4-209 (1989). See also, *e.g.*, C. McCormick, HANDBOOK ON THE LAW OF DAMAGES 318-319 (1935) (damages for pain and suffering represent "an arbitrary allowance" for which the jury is given "no standard to go by": the principal restraint on such awards is simply the "common sense of the jury").

Accordingly, the size of the compensatory damages award, while not irrelevant, is but one factor for a court to consider in determining whether the amount of punitive damages is so large as to offend the Due Process Clause. Although some commentators have proposed that punitive damages be considered presumptively excessive if greater than a prescribed multiple (typically three) of the amount of compensatory damages,[11] a punitive damages award should neither be conclusively unconstitutional simply because it is more than three times the compensatory award[12] nor conclusively constitutional because it is less than a trebled compensatory award. In the absence of legislative reform, arbitrariness and irrationality can be rooted out of the present punitive damages system only if this Court establishes a due process standard that eschews fixed formulas and instead requires a case-specific analysis of the rationality of the jury's verdict.

3. *Actual or potential gain to the defendant*

Much like the harm to the plaintiff, the punishment inflicted by a punitive damages verdict may be so far out of line with the amount that the defendant gained or reasonably could have expected to gain from its misconduct as to suggest irrationality. See *Busher*, 817 F.2d

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[11] See, *e.g.*, American College of Trial Lawyers, REPORT ON PUNITIVE DAMAGES 15 (1989); ABA Special Comm. on Punitive Damages, PUNITIVE DAMAGES: A CONSTRUCTIVE EXAMINATION 6-10 to 6-12 (1986).

[12] Where the injury caused is slight or only nominal, basing the penalty on the amount of compensatory damages may be inadequate to provide appropriate punishment and deterrence. This Court recognized as much in *St. Louis, I.M. & S. Ry.* v. *Williams*, *supra*. There the penalty imposed pursuant to statute ($75 for a $.66 overcharge) was held not to be excessive because no individual passenger would have an incentive to sue for such nominal actual damages (this was before the advent of class actions) and because the railroad could wrongfully obtain substantial profit from "the numberless opportunities for committing the offense" (251 U.S. at 67). See also *Seaboard Air Line Ry.* v. *Seegers*, 207 U.S. 73, 78 (1907).

at 1415; *Hawkins* v. *Allstate Insurance Co.*, 733 P.2d 1073, 1080-1081 (Ariz.), cert. denied, 484 U.S. 874 (1987); Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40 ALA. L. REV. 831, 874-875 (1989); Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258, 1319 (1976). In such an instance, it would be exceedingly difficult to justify the amount of punitive damages as necessary or appropriate to achieve adequate punishment. Bentham, at 179-181; Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 ALA. L. REV. 1143, 1179 & n.69 (1989).[13]

III. THE PUNITIVE DAMAGES AWARD IN THIS CASE IS PLAINLY EXCESSIVE

Application of the *Solem* framework to this case makes it evident that the punitive verdict is grossly excessive

[13] Evidence of Pacific Mutual's "wealth" was not submitted to the jury or relied upon by the Alabama courts to justify its punishment and therefore does not appear to be an element of this case. In general, the role of wealth in the excessiveness inquiry must be limited if punitive damages awards are to be kept within reasonable bounds. Punitive damages are awarded to deter and punish particular misconduct, and the Constitution therefore dictates that the defendant's conduct be central to the selection of punishment. To allow conduct-based limitations to be overridden by consideration of the defendant's finances would be irrational. The penalty would not "fit the crime," but instead would punish a large entity simply for its status, even though such status in itself is not wrongful. *United States* v. *United States Steel Corp.*, 251 U.S. 417, 451 (1920); *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 273-274 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980); cf. *Robinson* v. *California*, 370 U.S. 660 (1962). For these reasons, and because in the case of organizations charged with economic wrongdoing size has little rational nexus to effective deterrence, the great weight of scholarly commentary opposes giving size or wealth a major role in determining the size of punishment. See, *e.g.*, Cooter, 40 ALA. L. REV. at 1176-1177; Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 ALA. L. REV. 919, 950-952 (1989); Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 61-63 (1982).

and cannot be justified as a rational means of deterring or punishing the wrongful conduct found to have occurred.

To begin with, the jury's determination of the size of the punishment is not entitled to any appreciable deference. The amount of the verdict was not chosen by the jury from a legislatively established spectrum of permissible penalties for the kind of wrong Pacific Mutual was found to have committed. Rather, the jury was told no more than that "in fixing the amount [of punitive damages], you must take into consideration the character and degree of the wrong as shown by the evidence and the necessity of preventing similar wrongs." RT 897-898. Because the punitive damages award thus represents the view of only a single jury, with no experience of any kind in selecting punishments, and exercising unlimited and basically unguided discretion regarding the appropriate sanction, deferential review is not appropriate. See pages 11-12, *supra*.

A. The Award Is Grossly Disproportionate To Statutory Penalties In Alabama And Other Jurisdictions.

As noted above, the first step in assessing the rationality of a punitive damages award is to compare the amount of the award with criminal fines and civil penalties. Those legislatively established sanctions are fixed with reference to the same goals of deterrence and punishment that underlie punitive damages and therefore provide an objective standard for the proportionality review.

We have canvassed all the criminal fines and civil penalties prescribed by the Alabama legislature. None comes close to the penalty imposed by the jury in this case. Of greatest significance, the statutory penalties most directly applicable to Ruffin's conduct—embezzlement, theft, larceny, and willful violations of the State insurance code—are limited to $10,000. See Ala. Code §§ 13A-5-11, 13A-5-12(a)(1), 27-1-12, 27-12-17, 27-12-23.

The amounts of Alabama's other monetary punishments range from $10 for relatively minor conduct [14] to $50,000 for more serious wrongs.[15] The $1 million penalty in this case is far outside that range.

It is especially noteworthy that, in fixing this range of penalties, the Alabama legislature has distinguished for purposes of punishment between individuals and organizations such as corporations, which cannot be imprisoned but can only be fined. Thus, in a variety of circumstances —including insurance offenses—Alabama's penal code provides more severe fines for corporations, typically prescribing a multiple of the maximum fine for individuals.[16] But even after taking these differences into account, the fine levels are far below the punishment imposed by the jury here.

The verdict is equally excessive when viewed against the statutory penalties for similar misconduct in other jurisdictions. For example, the highest penalties authorized by other states for willful violations of insurance regulations, embezzlement, larceny, and theft generally

[14] *E.g.*, Ala. Code § 6-6-9 ($10; failure of summoned witness to attend an arbitration without a sufficient excuse); Ala. Code § 13A-12-3 ($10-$50; selling cigarettes to minors); Ala. Code § 14-6-21 ($10-$100; person having custody of a jail allowing the jail to become "foul or unclean"); Ala. Code § 22-9-78 ($5-$25; midwife's failure to report a death); Ala. Code § 34-23-52 ($10; late payment of pharmacists' license fee).

[15] *E.g.*, Ala. Code § 8-19-11 (up to $25,000; violation of a deceptive trade practice order); Ala. Code § 22-22A-5 ($100-$25,000; violation of environmental regulations); Ala. Code § 22-30-19 ($50,000; violation of hazardous waste regulations); see also Ala. Code § 5-5A-10 ($1,000-$10,000 per day; engaging in banking without a permit); Ala. Code § 5-20-7 (up to $10,000 per day; failure of credit card company to comply with cease and desist order).

[16] Ala. Code § 27-29-10 (insurer subject to a fine of up to $10,000 for violation; individual subject to a fine of up to $1,000 for same conduct); Ala. Code § 34-7-25 (corporation subject to a $500 fine for practicing cosmetology without a license; individual subject to a $100 fine).

range from $10,000 to $100,000, with some states providing an alternative fine of two or three times the defendant's gain.[17] The verdict is thus grossly in excess of the punishment level that legislatures have deemed appropriate for misconduct of the type present in this case. Accordingly, this factor alone establishes the impropriety of the jury's award.[18]

At a minimum, the disparity suggests that the punitive damages award is presumptively excessive. That conclusion is confirmed by an examination of the relationship between that penalty and the wrongful conduct.

B. The $1,000,000 Penalty Bears No Reasonable Relationship To The Gravity Of The Conduct Being Punished.

As a preliminary matter, any assessment of the rationality of the punishment in this case requires a careful and precise identification of the conduct being punished and of the rationale for imposing punishment on Pacific Mutual. A proper analysis of that question reveals that there is no acceptable basis for punishing Pacific Mutual; even if there were, any imaginable rationale for doing so cannot support the massive punishment imposed.

1. The Alabama courts did not identify the basis on which the jury was permitted to punish Pacific Mutual.

[17] Only Arizona authorizes higher sanctions—fines of up to $150,000 for individuals (see Ariz. Rev. Stat. § 13-801) and $1 million for corporations (see Ariz. Rev. Stat. § 13-803). However, these maxima, which are fixed by general sentencing provisions applicable to a wide variety of offenses, reflect the legislature's judgment regarding the appropriate sanction for the most severe felonies. They therefore provide no basis for upholding the punishment in this case, which surely did not involve misconduct at the upper limits of wrongfulness.

[18] No different conclusion is supported by examination of other punitive damages awards in Alabama, which, as petitioner has demonstrated (see Pet. Reply Br. App. E1-E10), range over a large scale. For the reasons we already have discussed (see note 6, *supra*), such awards do not establish a rational yardstick against which to measure the punishment in this case.

In fact, the Alabama Supreme Court, having once concluded that the sale of health insurance policies to plaintiffs was done within the scope of Lemmie Ruffin's apparent authority (see Pet. App. B7-B10), never separately addressed whether this asserted basis for civil *compensatory* liability sufficed for the quite distinct task of determining susceptibility to *punishment*. In fact, the two questions are worlds apart. When the faithless Ruffin, acting as an intermediary between Pacific Mutual and Union Fidelity on the one hand and plaintiffs on the other, purloined the insurance premiums, someone would have to bear the resulting loss. The principles invoked by the court below may serve to explain why, as between two innocent parties, that loss should be borne by Pacific Mutual as Ruffin's employer. But it is surely a far different question whether an innocent party may properly be punished. The Alabama Supreme Court simply assumed an affirmative answer to that question by conflating the conceptually distinct punitive and compensatory inquiries and conducting only the latter. See 1 & 2 J. Ghiardi & J. Kircher, PUNITIVE DAMAGES LAW AND PRACTICE §§ 2.04, 24.07 (1985); Cooter, 40 ALA. L. REV. at 1181-1182; see also Huber, *No-Fault Punishment*, 40 ALA. L. REV. 1037, 1044 (1989) ("a sweeping new notion of vicarious punishment [has developed, for a]s recently as 1967, the general rule was that an employer would not face punitive damages for the unsanctioned misconduct of an employee").

The analysis of the issue of punishability has been further confused by the failure to distinguish between the acts that were taken by Ruffin in furtherance of his agency relationship with Union Fidelity and Pacific Mutual (the sale of insurance policies and receipt of the premiums) and the wrongful acts for which punishment could constitutionally be imposed (the theft of the premium payments). The sale of the policies was within the scope of Ruffin's employment, but not punishable because not wrongful. The theft of the premiums, on the other hand, while certainly wrongful and punishable, cannot

rationally be said to have been in the course of or within the scope of Ruffin's employment with Union Fidelity and Pacific Mutual; rather, his self-enrichment by diverting to personal use funds paid to his employer was surely a frolic and detour of his own.[19]

Properly understood, therefore, Pacific Mutual has been punished for being the *victim* of wrongful acts. (It was a victim because Ruffin's theft exposed it to liability under the policies while depriving it of the premium payments that would cover the insurance risk.) We cannot believe that the Constitution permits the punishment of defendants because of crimes directed at least in part *against* them, and from which they derive no benefit.

2. Assuming for present purposes that we are wrong about the constitutional limits on the State's power to inflict punishment in a case such as this, it remains necessary in considering the rationality of the punishment to identify the actor and the conduct that properly are the focus of the proportionality analysis. Pacific Mutual's punishment could not have been and was not imposed here on the basis of any direct role by the company in the wrongdoing, because the company had none: Ruffin did not act pursuant to some company-wide policy, or with the consent of management, or even in furtherance of any interest of the company.[20]

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[19] This case is thus different, for purposes of vicarious liability, from one in which an insurance agent commits fraud in the course of selling a policy. In the latter situation, even though the fraud may not have been authorized and may have violated his employer's policies, there is at least a sense in which the agent can be said to be acting as the corporation in committing the wrongful acts. For reasons that space does not permit us to explore here, we do not believe that punishment of the corporation is constitutionally permissible solely on the basis of vicarious liability even in such circumstances. But that is a question the Court need not address in this case, because Ruffin's wrongful acts cannot in any sense rationally be said to have been the imputable acts of his employer.

[20] Respondents argued in their brief in opposition (at 4) that "Pacific Mutual's corporate responsibility was premised on *corporate* malfeasance" (emphasis in original), because the Birmingham office

This leads to two possible ways of looking at the case. Under one view, the company's vicarious liability for punishment forces it to stand in Ruffin's shoes and accept any punishment that could rationally have been imposed on Ruffin for his individual wrongdoing. Under another, Pacific Mutual is being punished for "corporate wrongdoing" occurring at the sales agent level. From either perspective, however, the punishment of approximately $1,000,000 cannot be justified in the circumstances of this case.[21]

Viewing Ruffin as the subject of punishment, we readily acknowledge that the misconduct (embezzlement of the insurance premiums), though not violent, is of some gravity. But the loss inflicted on respondent Haslip—$4,000 in out-of-pocket expenses and some amount, perhaps approaching $40,000, for nonmonetary injuries[22]—is slight

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manager allegedly had notice of Ruffin's wrongful conduct. But if the office manager countenanced Ruffin's fraud, he was certainly not acting on behalf of or in the interests of the company. See Pet. Reply Br. 3-4. And, to the extent Pacific Mutual had notice of Ruffin's acts (but see *id.* at 1-4), that evidence is not relevant. The jury was not asked to punish Pacific Mutual for failing to supervise Ruffin (an act that would, at most, amount to ordinary negligence and therefore provide no basis for imposition of punitive damages). Rather, the punishment plainly was inflicted for Ruffin's diversion of the premium payments.

[21] The judgment in this case does not specify the portion of respondents' recovery that constitutes punishment rather than compensation. See Pet. App. B3. Nevertheless, as petitioner has discussed (Pet. Reply Br. 5-6 & n.3), the record makes clear that the great bulk of the $1,040,000 awarded to respondent Haslip must have been intended as punitive damages. Indeed, respondents themselves repeatedly characterized the punitive award in the court below as greater than $1,000,000 Ala. Sup. Ct. Br. 58, 62. Because the Alabama courts did not clarify the precise amount of the punishment and upheld a punitive damages award that may be (and in fact appears to be) some $1,000,000, analysis of the constitutional issues in this Court should proceed on the premise that such damages constitute the overwhelming share of the jury's verdict.

[22] If, as respondents have stated (see note 21, *supra*), approximately $1 million of the award is punitive, the remainder of the award—$40,000—must be compensatory.

in relation to the size of the punitive award and cannot rationally explain it. So too for Ruffin's gain, which was but a tiny fraction of the punishment exacted.

No different conclusion can be reached when considering the purposes of punishment. From the standpoint of just retribution, the penalty is wildly disproportionate. The same is true for the goal of rational deterrence. A fine of $1,000,000 far exceeds any amount that could possibly be necessary and appropriate to deter Ruffin and others like him from similar wrongdoing in the future. Indeed, because the penalty is to be exacted from Pacific Mutual, with which Ruffin could have no hope of a continuing relationship, the size of the penalty is bound to be entirely immaterial to Ruffin and therefore entirely incapable of achieving deterrence. In sum, if Pacific Mutual is being made to stand in the shoes of Lemmie Ruffin for purposes of punishment, the verdict is egregiously excessive.

Precisely the same conclusion follows if the punishment is viewed as being inflicted for corporate wrongdoing. In contrast to Ruffin himself, the character of the company's conduct involves no conscious or deliberate wrongdoing of any kind. And the punitive award remains just as disproportionate to respondents' loss when viewed from this perspective. Moreover, the element of gain to the "offender" vanishes entirely. Even if the company could have avoided any liability to respondents, the diversion of the insurance premiums from Union Fidelity and Pacific Mutual to Ruffin would have gained it not one cent; as matters eventuated, Pacific Mutual was (quite apart from punishment) left with the responsibility of providing health insurance but without the benefit of the corresponding premium income.

Nor, for a variety of reasons, does a deterrence rationale better support a large award against Pacific Mutual than it would against Ruffin himself. First, although the company itself is a large entity, the responsibility

for any misconduct is limited to the lowest level of the company. It would plainly be irrational to treat fraud or theft by Ruffin as equivalent to similar conduct undertaken or authorized at higher levels of the company: Ruffin simply lacked the capacity to engage in corporate wrongdoing of the same scope as those with greater authority. By the same token, the company is bound to be less resistant to disciplining an employee such as Ruffin than a high-ranking officer and therefore will be deterred by a far lower penalty from countenancing misconduct by one at Ruffin's level in the corporate hierarchy. Furthermore, because the scheme for which Pacific Mutual is being held responsible was bound to be discovered when one of the respondents incurred medical expenses and could result only in losses to the company, a purely nominal fine will satisfy fully any need to deter future "misconduct" of this sort.

Because anything beyond a relatively modest monetary sanction far exceeds what is justifiable to punish and deter the type of conduct in question here, the award against Pacific Mutual is constitutionally excessive and must be set aside.

C. Alabama's Post-Verdict Review Procedures Do Not Eliminate The Unconstitutionality Of The Punitive Award In This Case.

Respondents contend (Br. in Opp. 14-16) that the state-law review of the size of the punitive damages award conducted by the courts below assured satisfaction of any proportionality inquiry mandated by the Due Process Clause. That is simply incorrect. The Alabama courts did not even purport to conduct the kind of proportionality review required by the Due Process Clause.[23] The trial court made only the conclusory finding that the award was "not excessive as a matter of law," even

[23] Of course, even if they had, an erroneous conclusion that the sanction was not arbitrary would not insulate the award from review by this Court.

though it was "for a great amount of money" and the court "would in all likelihood have rendered a less[e]r amount." Pet. App. A15. And the Alabama Supreme Court observed merely that "jury verdicts are presumed correct, and that presumption is strengthened when the presiding judge refuses to grant a new trial." *Id.* at B13.[24] Such perfunctory review in the course of upholding the punishment under state law does not preclude scrutiny of the jury's exorbitant award under the federal Constitution.

CONCLUSION

The judgment of the Alabama Supreme Court should be reversed.

Respectfully submitted.

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[24] The very language of these decisions undercuts respondents' assertion (Br. in Opp. 12) that the verdict was subjected to de novo review.